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No. 80- ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

JAMES F. JOY, DONALD A. FERGUSSON, ROBERT A. FERGUSSON, and ROGER O. WALTHER,
*Petitioners,*

v.

WACHOVIA BANK AND TRUST CO., N.A., MELLON BANK, N.A., FIRST WISCONSIN TRUST CO., THE DREYFUS OFFSHORE TRUST, N.V., and NATIONAL FIRE INSURANCE CO. OF HARTFORD,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED *

1. May a federal court create a damage remedy under section 17(a) of the Securities Act of 1933 or section 10 (b) of the Securities Exchange Act of 1934 in favor of sophisticated institutional investors which purchased securities in a private placement and which either could not establish the elements of any of the express causes of action which those Acts provide injured securities purchasers, or chose not to avail themselves of those remedies at a time when such remedies would have been available?

2. If such a damage remedy may be created, should it be available against persons who are neither purchasers nor sellers of securities?

3. Did the court below, in conflict with the principles of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), and the Seventh Circuit's decision in *Schaefer* v. *First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), err by applying prospectively only, a District of Columbia blue sky statute of limitations which that court had previously held to be applicable?

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* Petitioners also incorporate by reference the "Questions Presented" in the Petition for Writ of Certiorari filed by petitioners White & Case and Marion Jay Epley, III (hereinafter the "White & Case Petition") in No. 80-1691 and the Petition for Writ of Certiorari filed by petitioners Peat, Marwick, Mitchell & Co., Anthony M. Natelli and Joseph Scansaroli (hereinafter the "PMM Petition") in No. 80-1684.

## PARTIES BELOW

Plaintiffs-appellants-cross-appellees in the court of appeals were Wachovia Bank and Trust Co., N.A., Mellon Bank, N.A., First Wisconsin Trust Co., The Dreyfus Offshore Trust, N.V., and National Fire Insurance Co. of Hartford. The defendants-appellees-cross-appellants were Cortes W. Randell, James F. Joy, Roger O. Walther, Peat, Marwick, Mitchell & Co., Anthony M. Natelli, Joseph Scansaroli, Donald A. Fergusson, Robert A. Fergusson, White & Case and Marion J. Epley, III. The defendants-appellees were John G. Davies, Bernard J. Kurek and Dennis M. Kelly.

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IN THE

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OCTOBER TERM, 1980

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No. 80 - ——

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JAMES F. JOY, DONALD A. FERGUSSON, ROBERT A. FERGUSSON, and ROGER O. WALTHER,
*Petitioners,*

v.

WACHOVIA BANK AND TRUST CO., N.A., MELLON BANK, N.A., FIRST WISCONSIN TRUST CO., THE DREYFUS OFFSHORE TRUST, N.V., and NATIONAL FIRE INSURANCE CO. OF HARTFORD,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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### OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported; it is unofficially reported at [1980] CCH Fed. Sec.L.Rep. ¶ 97,712 and is set forth in the Appendix to the White & Case Petition beginning at page A-1, and in the Appendix to the PMM Petition beginning at page 1a. The opinion of the district court is not officially reported; it is unofficially reported at [1979] CCH Fed. Sec.L.Rep. ¶ 96,784 and incorporates by reference a memorandum opinion the district court entered on November 21, 1978, which is reported at 461 F. Supp. 999 (1978). The opinion of the district court is set forth in the Appendix beginning at page A-1. The memorandum opinion it incorporates by reference is set forth in the Appendix

to the White & Case Petition beginning at page B-1 and in the Appendix to the PMM Petition beginning at page 38a.

## JURISDICTION

The judgment of the court of appeals was entered on December 5, 1980. Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 4, 1981, with two judges voting to grant rehearing *en banc* and one judge not participating. This petition is filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Orders denying the petition for rehearing and suggestion for rehearing *en banc* are set forth in the Appendix to the White & Case Petition beginning at page C-1 and in the Appendix to the PMM Petition beginning at page 64a.

## STATUTORY AND REGULATORY PROVISIONS

Sections 5, 11, 12, 13, 16 and 17 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77e, 77k, 77l, 77m, 77p, 77q (1976), and Sections 9, 10, 18, and 28(a) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78i, 78j, 78r, 77bb(a) (1976), are set forth in the Appendix to the PMM Petition beginning at page 68a. Section 14 of the District of Columbia Securities Act of 1964, Pub. L. No. 88-503, § 14, 78 Stat. 629, D.C. Code § 2-2413 (1973), and Pub. L. No. 88-241, § 1, 77 Stat. 510, D.C. Code § 12-301 (1973) are set forth in the Appendix to the White & Case Petition beginning at page D-1.

## STATEMENT OF THE CASE

### I. Introduction

Petitioners incorporate by reference the "Introduction", set forth on pages 2-7 of the White & Case Petition, and "The express causes of action", set forth on pages 3-5 of the PMM Petition.

Petitioner Roger O. Walther became a director of National Student Marketing Corp. ("NSMC") in February 1969, when NSMC acquired a closely-held private company in which he held approximately one-third of the shares. In exchange for his interest, Walther received shares of NSMC, a portion of which NSMC arranged simultaneously to have sold in a private placement. Walther never thereafter sold any of the NSMC stock he had acquired. In July 1969, he became NSMC's executive vice-president.

Petitioner Donald A. Fergusson became a director of NSMC in January 1968, when NSMC acquired, in exchange for NSMC shares, a company owned by him, his wife, and petitioner Robert A. Fergusson. Donald A. Fergusson served as executive vice-president of NSMC from November 1968 until May 1969, and thereafter as senior vice-president. Petitioner Robert A. Fergusson became a director in October 1968. In February 1969, he became a group vice-president. In December 1969, petitioners Donald A. and Robert A. Fergusson sold a portion of their NSMC shares in the private placement involved in this suit.

Petitioner James F. Joy was an officer and director of NSMC, and during 1968-1969 he acquired some NSMC shares. He did not sell any of these shares until late 1972.

**II. Proceedings Below**

Petitioners incorporate by reference the "Proceeding Below", set forth on pages 7-10 of the White & Case Petition, and "The decisions below", set forth on pages 6-9 of the PMM Petition.

Petitioners filed motions to dismiss the complaint on the grounds that the federal claims were barred by the statute of limitations and respondents had no "implied"

damage remedy under section 17(a) of the 1933 Act or section 10(b) of the 1934 Act. The district court dismissed the complaint as time-barred. It did not address the question of implied remedies.

Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit, and petitioners filed timely cross-appeals from the Order denying their motions to dismiss on the ground that respondents had no implied right of action. After the court of appeals reversed the lower court's dismissal on statute of limitations grounds and denied the cross-appeals, petitioners filed timely petitions for rehearing and suggestion for rehearing *en banc*.

## REASONS FOR GRANTING THE WRIT

Petitioners incorporate by reference the "Reasons For Granting the Writ" set forth at pages 10-27 of the White & Case Petition and at pages 9-18 of the PMM Petition.

In addition, petitioners wish to point out that even if it were appropriate to imply a remedy under section 17(a) of the 1933 Act or section 10(b) of the 1934 Act in favor of open-market purchasers, a different rule should obtain with respect to sophisticated institutional investors such as plaintiffs which purchase in a private placement and have access to documents filed with the Securities and Exchange Commission ("SEC"). As to those sophisticated investors, the express remedy provided by Congress in section 18 of the 1934 Act should be held to be exclusive.

In enacting the 1934 Act and imposing a duty of disclosure (*e.g.*, see §§ 13(a), 15(d), 15 U.S.C. §§ 78m(a), 78o(d)), Congress' purpose, in part, was to provide material and truthful information to investors, so that they are able to make intelligent investment decisions. The filing requirements of the 1934 Act further this purpose

by providing data for sophisticated investors and market analysts which they will filter into the securities market. While the large class of unsophisticated investors may rely only upon the integrity of the market in making their investment decisions and sustain injury through interference with the normal market mechanism accomplished by the dissemination of false and misleading information to which they have not been directly exposed, *e.g.*, see *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976), sophisticated investors who purchase in a private placement have access to the documents filed with the SEC and undoubtedly read and rely upon them, or must be encouraged to do so.

If section 18 is not held to be their exclusive remedy, Congress' purpose in enacting section 18 and in imposing specific express limitations on the right to sue are undermined. As the court of appeals recognized, section 18 "has 'the narrow and particularized objective of encouraging use of and reliance upon records filed with the S.E.C.'" (White & Case Petition, A-31; PMM Petition, p. 32a). If a remedy under section 10(b) is created for sophisticated investors who have not alleged reliance because they did not read documents filed with the SEC and which are readily available to them, this purpose is undermined.[1] If a remedy under section 10(b) is created for sophisticated investors who in fact relied

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[1] The complaint pled reliance, but the courts below accepted plaintiffs' disclaimers of reliance made by affidavit in response to PMM's motion to dismiss. Even if plaintiffs disclaimed reliance because they did not in fact read and rely upon the actual documents filed with the SEC, the effective functioning of the securities markets requires that they be encouraged to do so by remitting them to remedies available under section 18. Plaintiffs, moreover, admitted they they did rely on statements which also appear in filed documents. (Plaintiffs' Memorandum in Opposition to Motions of Certain Defendants to Dismiss for Failure to State a Cause of Action, pp. 3-4).

upon filed documents, then the choice they are given between proceeding under that section or section 18 in all probability will be dictated by their assessment of the very restrictions Congress imposed upon the right to sue. For example, the choice of plaintiffs—sophisticated institutional investors which were provided with copies of filed documents—was obviously dictated by the absence of congressionally imposed restrictions in section 10, since their suit was time-barred by section 18's express statute of limitations.[2]

Even if remedies under the 1933 and 1934 Acts may be implied, the question remains whether particular plaintiffs may properly invoke them to reach the conduct alleged (see *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977)). The answer here should have been in the negative, for the implication of a cause of action in favor of sophisticated investors which purchase in a private placement undermines the purpose of the 1934 Act and nullifies the protections Congress created for persons such as petitioners here.

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[2] Section 18(c), 15 U.S.C. § 78r(c) requires that suit be brought "within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued."

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1981

# APPENDIX

# APPENDIX

## Opinion of United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

M.D.L. No. 105; Civil Action No. 166-73

WACHOVIA BANK AND TRUST CO., N.A., *et al.*,
*Plaintiffs,*

v.

NATIONAL STUDENT MARKETING CORPORATION, *et al.*,
*Defendants.*

February 28, 1979

PARKER, District Judge: On November 21, 1978, the Court dismissed this securities complaint as to the attorney-defendants White & Case and Marion J. Epley, III; and the accountant-defendants Peat, Marwick, Mitchell & Co., Anthony M. Natelli and Joseph Scansaroli.[1] In the Memorandum Opinion entered that date and hereby incorporated by reference, the Court held in substance that the Wachovia complaint was barred by the two year statute of limitations of the District of Columbia Blue Sky Law, D.C. Code § 2-2413(e) (1973), because: 1) the 1969 National Student Marketing Corporation (NSMC) stock sales at issue occurred more than two years before the complaint was filed; 2) the federal tolling doctrine did not apply to the attorney-defendants since the precipitous decline of the stock price and public coverage of NSMC's financial difficulties, *inter alia*, shortly after the sales should have led the plaintiffs to investigate and discover the attorneys' role in the stock fraud; and 3)

[1] Plaintiff's motion for reconsideration was denied on December 22, 1978. Plaintiffs' motion for amendment of judgment is denied this date.

the class action tolling doctrine did not apply to the accountant-defendants since the plaintiffs filed this complaint prior to certification of class actions and, after certification, opted-out of the class. The plaintiffs have appealed this decision.[2]

Defendants James J. Joy, Cortes W. Randell, Roger O. Walther, Donald A. Fergusson, Robert A. Fergusson and Bernard J. Kurek[3] have now filed motions to dismiss the complaint as to them on statute of limitations grounds. The other remaining defendants, John G. Davies and Dennis M. Kelly, have not filed motions to dismiss.

For the reasons outlined in the Court's Memorandum Opinion of November 21, 1978, a dismissal of the Wachovia complaint against all remaining defendants as barred by the District of Columbia Blue Sky Law statute of limitations is appropriate.

As the complaint reflects, all of the defendants were officers and/or directors of NSMC at the times relevant to the complaint. Defendant Joy was a director and senior vice-president; Randell, president and chief executive officer; Walther, executive vice-president and chief operating officer; Donald A. Furgusson, a director and senior vice-president; Robert A. Fergusson, a director and group vice-president; Kurek, controller, treasurer and vice-president; Davies, a director, secretary and general counsel; and Kelly, vice-president—Corporate Busi-

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[2] The Court also found that plaintiffs had stated a private cause of action under § 17(a) of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of 1934, and therefore denied defendants' motion for judgment on the pleadings on those grounds. Defendants have cross-appealed this determination.

While the moving defendants here repeat the implied private cause of action arguments, the Court need not address the issue in light of this disposition.

[3] Kurek filed a *pro se* motion in the form of a letter to the Court.

ness Development. The Court's previous finding that events shortly after the stock sales were sufficient to put plaintiffs on notice of the role of the NSMC attorneys in the stock fraud applies with even greater force to these actual officers and directors of NSMC. By virtue of their status they were intimately involved with NSMC financial affairs and decisions relative to stock sales.

In addition, all of the remaining defendants were named as defendants in at least one of the 1970 New York class actions filed in connection with the NSMC fraud, *Garber* v. *Randell*, 70 Civ. 835 (Mar. 2, 1970) and *Lipsig* v. *National Student Marketing Corp.*, 70 Civ. 2006 (May 15, 1970). Therefore, plaintiffs were clearly on notice of the potential role of these defendants in the stock fraud well within two years of the 1969 sale. Given these circumstances, plaintiffs' complaint is not protected by the federal tolling doctrine.

Nor can plaintiffs claim protection from the class action tolling doctrine. As the Court detailed in its Memorandum Opinion of November 21, 1978, the benefits of that doctrine do not apply where the plaintiffs filed this case prior to a certification decision in the New York class actions and, after certification, opted-out of the class.

Based on the foregoing, it is this 28th day of February, 1979,

ORDERED that the motions to dismiss on statute of limitations grounds filed by defendants Joy, Randell, Walther, Donald A. Fergusson, Robert A. Fergusson and Bernard J. Kurek are granted; and the complaint is dismissed with prejudice as to them; and it is

FURTHER ORDERED that the complaint is dismissed with prejudice *sua sponte*, as to defendants Davies and Kelly as barred by the statute of limitations.

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see 80

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see 80

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